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RECORD, CASE No. 13,933.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~294~~. 61

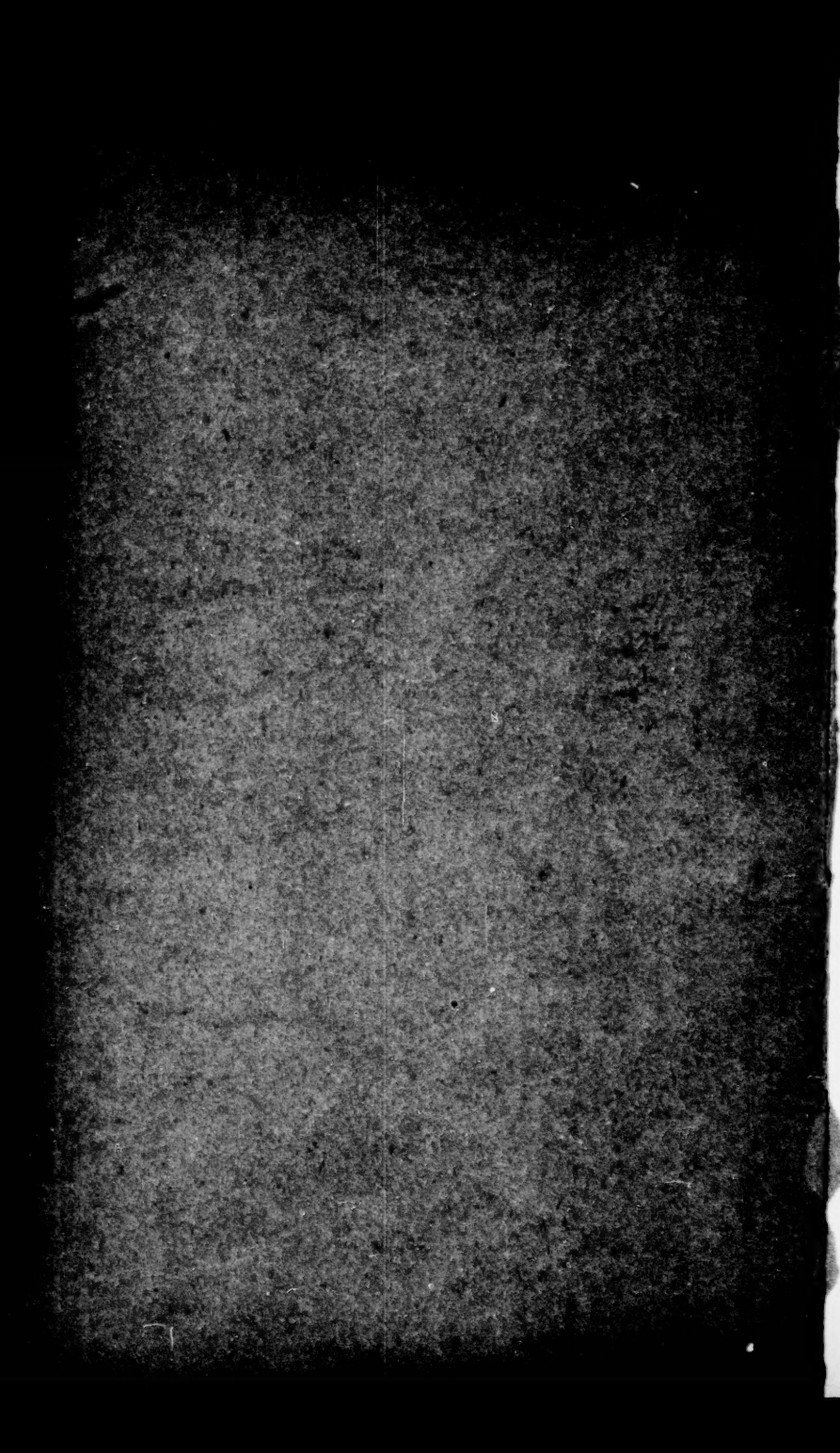
DANIEL T. HEDGES ET AL., APPELLANTS,

vs.

THE COUNTY OF DIXON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED DECEMBER 23, 1889.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1892.

1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, at the January term, 1889.

Be it remembered that on the 26th day of May, 1888, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In Equity.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Daniel T. Hedges, Thomas C. Sullivan, Thomas J. Stone, Edward B. Spaulding, Luther C. Sanborn, J. L. Follett, and A. S. Ganetson, all of Sioux City, in the State of Iowa, and citizens of said State, and Marshal Field and Levi Z. Leiter, of the city of Chicago and State of Illinois and citizens of that State, and Joseph N. Field, of Manchester, in England, and citizen of the Kingdom of Great Britain, bring this their bill of complaint, on their own behalf and on behalf of all others similarly situated, against The County of Dixon, in the State of Nebraska, and a citizen thereof; and thereupon your orators complain and say—

I. In 1875 the Covington, Columbus and Black Hills Railroad Company was organized for the purpose of building and operating a railroad from Covington, in the county of Dakota and State of Nebraska, northerly through the county of Dixon, in said State, and had entered upon the construction of its road, when, in order to aid it in that behalf, the said defendant, which at the time was and long before had been a municipal corporation created by and existing under the laws of the said State, issued to the said company its eighty-seven several bonds, bearing date on the 1st of January, 1876, by each of which it acknowledged itself indebted and
2 firmly bound unto the said company in the sum of $1,000.00, which sum, for value received, it promised to pay said company or bearer at the Farmers' Loan and Trust Company, in the city of New York, on the 1st day of January, 1896, together with interest thereon from the 1st day of January, 1876, until paid at the rate of ten per cent. per annum, which interest was to be paid semi-annually on the first days of January and July of each year upon the presentation and delivery at the said trust company's office of all interest coupons thereto attached, and in each of the said bonds it was recited that it was one of the series — bonds for $87,000.00 issued under and in pursuance of an order of the county commissioners of t-e said county of Dixon and was authorized by the election held therein on the 27th day of December, 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska and amendments thereto and the constitution of said State, to which bonds were attached the usual coupons for interest therein mentioned; and afterwards said bonds were at the instance of said defendant duly certified by the county treasurer of said county and also by

the secretary and auditor of said State as having been issued according to law, as required by law, and were duly registered in his office by the said auditor. A copy of one of the bonds is hereto attached, marked Exhibit "A."

II. Afterwards certain of the said bonds came to your orators and they are holders thereof as follows: Your orator Hedges is the owner and holder of the said bonds numbered 1, 2, 3, 5, 6, 7, 13, 14, 15, 16, 17, 19, 20, 21, 22, 26, 27, 28, 29, from 31 to 40, both inclusive, 45 and 46, 56, and 87. Your orator Stone is the owner and holder of bonds numbered from 8 to 12, both inclusive, 23, 48, 50, 78, and 79.

Your orators Sauborn & Follett, who are copartners doing business under the firm name of Sauborn & Follett, are the owners and holders of bonds number 18, 30, and 47. Your orator Mar-
3 shal Field is the owner and holder of bonds number- 24, 25, 51, 55, and 60.

Your orator Joseph N. Field is the owner and holder of bonds number- 62 to 69, both inclusive. Your orator Leiter is the owner and holder of bonds number- 61 to 73, both inclusive.

Your orator A. S. Ganetson is the owner and holder of bonds number- 83, 84, and 85. Your orator E. B. Spaulding is the owner and holder of bonds number- 4, 52, 53, and 54. Your orator Thomas C. Sullivan is the owner and holder of bonds number- 41 and 42. Bonds not numbered above are held by divers persons to your orators unknown.

Your orators and other holders of said bonds all paid value for the same and took them without notice of any facts invalidating them, and, relying upon the recitals contained therein and the several certificates endorsed thereon by the county clerk and secretary and auditor of state to the effect hereinbefore stated, *and* believed the same to be a valid and binding obligation of the said county, according to the terms and purport thereof.

III. When such of the said coupons attached to the said bonds when issued as have matured became due and payable the same were duly presented for payment at the place named therein in that behalf and payment demanded, but refused, and your orators have frequently applied to the said defendant and its treasurer, at his office, in said county, for payment of the said coupons which have heretofore matured and demanded payment thereof, but the same has been refused and no part thereof has been paid.

IV. In excuse for not performing its promises in the said bonds and coupons contained the said defendant and its officers alleges that when the said bonds were issued the amount thereof exceeded ten per cent. of the assessed valuation of the property of the said county, and that by reason of the provisions of the constitu-
4 tion of the said State said bonds were issued without authority of law, and that the act of issuing them was beyond the competency of the officers in the said county in that behalf, and your orators are informed and believe that the sum of $87,000.00 exceeded the assessed valuation of the county.

V. But your orators say that to the extent of the amount of the said bonds which was within ten per cent. of the assessed valuation

of the property of said county at the time of the issue of the said bonds the same is and ought to be by your honors held valid and binding upon the said county, being the sum for which it was competent for its officers to issue its bonds for the purpose aforesaid; that the railroad in aid of which the said bonds were issued has been built and is now in operation and is a first-class railroad in all particulars, and that the said county and its citizens and owners of property therein have received such consideration as they were entitled to for the said bonds, although they may not be bound to pay such part of the aggregate issue thereof as exceeds ten per cent. of the assessed valuation of the property of the said county, and more particularly ought the defendant to redeem its said promises to the extent of the sum for which it was competent for its officers to issue its bonds, because your orators and other holders thereof by reason of the statements of facts contained therein and in the certificates of the State officers were induced to and did pay a valuable consideration therefor.

VI. And your orators on their own behalf hereby offer to surrender up to be cancelled such an amount of the bonds held by them as exceeds ten per cent. of the assessed valuation of the property of the said county when the same were issued, each one of them surrendering his proportionate share of such excess, and your orators insist that the other holders of the said bonds, when they shall become known, should be brought before the court and impleaded in this bill of your orators as parties thereto and be by the order and decree of your honors admitted to the benefit of the decree in this suit; and your orators have applied to the said defendant and its officers to scale said issue of bonds upon the basis hereinbefore stated, but they have refused so to do.

All of which actings, doings, and refusals are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orators and the other holders of the said bonds, in whose behalf as well as on behalf of your orators this bill is exhibited.

In tender consideration whereof and to the end that the said defendants may, if they can, show cause why your orators should not have the relief herein prayed and may answer this bill of your orators according to the course and practice of the court, but not under oath—its answer under oath being hereby expressly waived—and that, under the order and direction of your honors, an account be taken to ascertain the excess of the issue of said bonds over ten per cent. of the assessed valuation of the property in said county, and that the said excess be distributed among the holders of said bonds and the amount each of them ought to remit in order to release the indebtedness of the said county over and above what its officers were competent to issue bonds for, and that it be declared that the bonds held by your orators and others in the same situation to an amount equal to ten per cent. of the assessed valuation of the property of said county on the 1st of January, 1876, be valid and binding upon the said defendant and ought to be paid by it to the holders of the said bonds, and that it be declared by your honors

that so much of the bonds held by each of your orators and others in the same situation as exceeds ten per cent. of the assessed valuation of the property of said county on the said day be surrendered, cancelled, and declared void, and that the residue of the said
6 bonds be declared good and valid, and that the said county pay to them the interest upon so much of the said bonds as shall be declared good and valid at the rate of ten per cent. per annum from the 1st day of January, 1876, to the date of the said decree, the amount going to each of the holders thereof being first ascertained by the said account, and that your orators have their costs of this suit and all such other and further relief as the circumstances of the case require and is agreeable to equity and good conscience—

May it please your honors to grant unto your orators and others in whose behalf this bill is filed the usual writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendant, County of Dixon, therein commanding it, at a date therein to be inserted, to appear before your honors in this honorable court and then and there stand to, perform, and abide such order and decree in the premises as to your honors shall seem meet and equitable.

And your orators will ever pray, etc.

J. M. WOOLWORTH,
Solicitor for Pl'ff- and of Counsel.

EXHIBIT A.

Coupon bond registered by the auditor and by the secretary of the State of Nebraska, county of Dixon under provisions of the new constitution of the State, adopted 1875.

No. 61. UNITED STATES OF AMERICA. $1,000.00

Popular sovereignty constitution. Progress.

STATE OF NEBRASKA, }
County of Dixon. }

Interest ten per cent. per annum, payable semi-annually, on the first days of January and July, at Farmers' Loan and Trust Company, in the city of New York.

7 Know all men by these presents that the county of Dixon, in the State of Nebraska, acknowledges itself indebted and firmly bound to the Covington, Columbus and Black Hills Railroad Company in the sum of one thousand dollars, which sum the said county, for value received hereby promises to pay to the said railroad company or bearer at the Farmers' Loan and Trust Company in the city of New York on the first day of January, 1896, together with interest thereon from the first day of January, 1876, until paid, at the rate of ten per cent. per annum, which interest shall be payable semi-annually on the first days of January and July of each year upon the presentation and delivery at the said The Farmers'

Loan and Trust Company of the coupons of interest hereto severally attached.

This bond is one of a series of eighty-seven thousand dollars, issued under and in pursuance of an order of the county commissioners of the county of Dixon, in the State of Nebraska, and authorized by an election held in the said county on the twenty-seventh day of December, A. D. 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska, and amendments thereto and the constitution of the said State articles 12, adopted October, A. D. 1875.

In testimony whereof the county commissioners have caused these presents to be signed by the chairman of the board and attested by the clerk of the said county and affixed the seal of the said county, at Ponca, the county-seat, this first day of January, A. D. 1876.

W. H. CLARK,
Chairman of the Board of County Commissioners of Dixon County, Nebraska.

Attest: E. M. BISBEE,
County Clerk of Dixon County, Nebraska.

[Seal of Dixon County, Nebraska.]

8 (Endorsement on back of bond.)

Extract from Constitution of Nebraska and the General Statutes of the State Authorizing the Issue of These Bonds.

Constitution of Nebraska, article 12. No city, town, county, or other subdivisions of the State shall ever make donations to any railroad, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law, and no bonds or evidences of indebtedness so issued shall be valid, unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law.

Chapter 35, General Statutes of Nebraska.

SEC. 1. Any county or city is hereby authorized to issue bonds in aid of any railroad provided the county commissioners shall first submit the question to a vote of the legal electors of the said county.

SEC. 2. The proposition of the question must be accompanied by a provision to levy a tax for the payment of the principal and interest of said bonds, in addition to the usual taxes.

SEC. 6. Any county which shall have issued its bonds in pursuance of this chapter, shall be estopped from pleading want of consideration therefor, and the proper officers may be compelled, by mandamus, or otherwise, to levy the tax herein provided to pay the same (Acts of 1875, sec. 3, page 170). Whenever the holder of county bonds shall present the same to the auditor of State for registration the auditor upon being satisfied that the same are issued according

to law shall register the same in his office, in a book kept for that purpose, and shall, under his seal of office, certify on such bonds the fact that they have been legally and regularly issued, and that such bonds have been registered in his office, in accordance with the provisions of this act.

9 SEC. 4. Whenever any of the bonds if any shall be so registered the auditor of State shall annually, on or before the second Monday of June, in each year, ascertain the amount of sinking fund and interest accrued and to accrue (before the tax for the next succeeding year shall be levied) upon all bonds registered in his office, and shall certify the amount thereof to the clerk of the county in which such bonds were issued.

SEC. 5. The clerk of any county, upon receiving such certified statement from the auditor of State, shall proceed to ascertain from the assessment-roll of such county, the amount of taxable property, and what percentage is required to be levied to pay said interest and create a sinking fund in compliance with the certificate of the said auditor, and shall levy such percentage upon the taxable property of said county, and the said taxes shall be collected by the county treasurer in the same manner as other taxes are collected.

Certificate of the County Clerk.

This certifies that the issue of bonds of which this — one, amounting in all to eighty-seven thousand dollars, is the only issue of bonds that has ever been made by the said county. The question of issuing said bonds was submitted to the people of the county by a resolution of the county commissioners dated November 24th, 1875, in the following form: Shall Dixon county issue to the Covington, Columbus and Black Hills Railroad Company $87,000.00 ten per cent. twenty-year bonds, payable, both principal and interest, in New York city, and shall a tax be annually levied in addition to the usual taxes sufficient to pay interest as it comes due and accumulate a sinking fund to pay the principal at maturity?

This question was decided by a vote taken Dec. 27th, 1875, of 462 votes for to 120 votes against.

10 Witness my hand and official seal this 16th day of May, A. D. 1876.

[Seal of Dixon County, Nebraska.]

E. M. BISBEE,
County Clerk.

For value received the Covington, Columbus and Black Hills Railroad Company hereby guarantees the holders hereof the payment of the principal and interest of the within bond according to the tenor thereof at the place where and as the same becomes due and payable.

In witness whereof the said Covington, Columbus and Black Hills Railroad Company has caused its common seal to be hereto affixed

and the same to be attested by its president the 3rd day of October, one thousand eight hundred and seventy-six

[Seal Covington, Columbus and Black Hills Railroad Company.]

A. W. HUBBARD,
President Covington, Columbus and Black Hills Railroad Company.

STATE OF NEBRASKA, } ss:
Auditor's Office, }

I, J. B. Weston, auditor of State, do hereby certify that upon the basis of the data filed in my office it appears that the attached bond, No. 61, has been regularly and legally issued by the county of Dixon to Covington, Columbus and Black Hills Railroad Company, and said bonds, upon presentation thereof by said company, has this day been duly registered in my office in accordance with the provisions of an act entitled "An act to authorize the registration, collection, and redemption of county bonds," approved February 25th, 1875.

In testimony whereof I hereunto set my hand and affixed my seal of office, at Lincoln, this 2nd day of October, 1876.

[Seal Auditor's Office, State of Nebraska.]

J. B. WESTON,
Auditor of State.

11 Registry No. 1319, vol. A, page 26.

STATE OF NEBRASKA, LINCOLN, *Oct. 2nd*, 1876.

We certify that this bond is issued pursuant to law.

BRUNO TZSCHUCK,
Secretary of the State of Nebraska.
J. B. WESTON,
Auditor of the State of Nebraska.

Upon the back of said bill appear endorsements in words and figures following, to wit: No. 209, M. United States circuit court, dist. of Neb. Daniel T. Hedges *et al. vs.* County of Dixon. Bill. Filed May 26, 1888. Elmer D. Frank, clerk. J. M. Woolworth, sol. for comp't.

Thereupon, afterwards, to wit, on the 6th day of August, 1888, demurrer was filed in said case; which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

D. T. HEDGES *et al.*
vs.
DIXON COUNTY. } Demurrer.

The Demurrer of Defendant, Dixon County, to the Bill of Complaint of Plaintiffs, D. T. Hedges et al.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' bill to be true in such manner and form as the same are therein set forth or alleged, does demur thereto, and for cause of demurrer shows that the said plaintiffs have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for from or against this defendant; wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any
12 further or other answer to the said bill or any of the things therein contained, and pray to be hence dismissed with its reasonable costs in this behalf sustained.

A. J. POPPLETON,
J. M. THURSTON,
J. B. BARNES,
Sol's for Defendant.

DISTRICT AND STATE OF NEBRASKA, } ss:
County of Douglas,

A. J. Poppleton, being duly sworn, says that the above demurrer is not interposed for delay; that this deponent is one of the counsel for the demurrant in the said demurrer, which is a public corporation.

Subscribed and sworn to before me this sixth day of August, 1888.

[SEAL.] JOSEPH R. CLARKSON,
Notary Public.

I, A. J. Poppleton, a counselor of said court, do hereby certify that in my opinion the above demurrer is well founded in point of law.

Dated Aug. 6, 1888.

A. J. POPPLETON,
Counselor-at-Law.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 209, doc. M. United States circuit court, district of Nebraska. D. T. Hedges *et al. vs.* Dixon County. Demurrer. Filed Aug. 6, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 16th day of November, 1888, the following proceedings were had and done in said cause, as appears of record on folio 106, Journal "N" of said court, to wit:

DANIEL T. HEDGES *et al.*
vs.
DIXON COUNTY. } 209, M.

This cause, coming on for hearing, was argued and submitted to the court on the demurrer of the defendant to the bill of
13 complaint herein; whereupon the court takes the same under consideration.

Thereupon, afterwards, to wit, on the 29th day of January, 1889, opinion was filed in said case; which said opinion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

DANIEL T. HEDGES *et al.*
vs.
COUNTY OF DIXON.

Opinion.

BREWER, *C. J.:*

The facts in this case are these: In 1876 Dixon County, the defendant herein, issued eighty-seven thousand of its bonds as a donation to the Covington, Columbus and Black Hills Railroad Company. The amount of such issue exceeded ten per cent. of the assessed value of the property of the county, by reason whereof it has been finally adjudged by the Supreme Court that the bonds were void.
Dixon County *vs.* Field, 111 U. S., 81.

This bill is brought by the complainants, who own nearly all of the bonds thus issued, praying that they may be scaled down to an amount equal to ten per cent. of the assessed value of the property of the county at the time of the issue, and to that extent held as valid obligations of the county and a decree entered against it therefor. The complainants offer to accept such reduced amount in satisfaction, and tender their bonds for cancellation on payment thereof. They also pray that the holders of the other bonds when known be brought before the court and impleaded in this bill and given
14 the same rights. To this bill the defendant demurs on the ground that it states no ground of action.

Conceding that the bonds as they stand are void, and that no recovery can be had thereon in a court of law, complainants insist that a court of equity has power to scale them down to an amount equal to that that the county might lawfully have issued and enforce them when thus scaled down. It is said that the vice of this transaction is only in the matter of excess; that a court of equity may expunge the vice and enforce the contract thus freed from every taint. Counsel for complainants concedes that he has been unable to find any precedent for such a proceeding, and his confession of inability is satisfactory evidence that no such precedent

exists; so that the question must be determined by reference to the general principals of law; and here it may be remarked that the difference between courts of law and those of equity is mainly one of forms and remedies rather than in the matter of absolute rights and obligations. If a contract be pronounced absolutely void in a court of law it must expect the same denunciation in a court of equity. Courts of equity, like those of law, must accept contracts as they are made and have no power to make contracts for parties. If the contracts which parties attempt to make are void because in defiance of some statute or common law they are void alike in either court, and neither court can change a void into a valid contract.

Now the contract in this cause in its inception was on the part of the county a single and indivisible obligation—that is, an attempted donation of eighty-seven thousand dollars to the railroad company. The bonds are merely evidences of the contract, the contract standing behind them, and whatever separate and divisible obligations of the county existed after the issue of the bonds the contract in the first instance was single and entire. Now that was an attempted donation of eighty-seven thousand dollars to the railroad company; such a donation the county had no power to make, and after it had finished its action nothing which the promisee, the other party to the contract, could do could give validity to the obligation of the county. It was either good or bad, dead or alive, when it left the hands of the promisor. Take this illustration:

If in a State where usury avoids the entire contract a usurious note be given, that note is void, and no willingness of the payee, no act of his, can transform that invalid into a valid contract.

Of course, it would be very satisfactory if the promisee, by consenting to a reduction of the interest, could give validity to a void promise, vitality to a dead contract. So here if the promisee, the railroad company, could reduce the extent of the promise it doubtless would be satisfactory, but it would be thereby making a contract or attempting to make a contract different from that which the promisor proposed. The fact that eighty-seven bonds were issued instead of one in no manner changes the primary obligation attempted to be assumed by the county.

Neither is this a case where there is an equity to compel payment by the county on the ground that it has received something, for the bonds were a donation, and no implied promise can be based upon the matter of value received. Counsel cites the case of Daviess County *vs.* Dickinson, 117 U. S., 657, in which, the county having authorized the issue of bonds to the amount of two hundred and fifty thousand dollars, the county officers issued three hundred and twenty thousand and the county was held liable for the first two hundred and fifty thousand; but the cases are not at all parallel. In that the principal had proposed a valid contract, it had done that which it had a right to do, and the wrong or misconduct of its agents, the county officers, was held not to invalidate that which the county has lawfully authorized.

16 In this there is no breach of duty charged upon the county officers; the agents have not departed from their instructions. The trouble lies in the action of the principal itself. Its action was unauthorized and, being without warrant of law, or rather in defiance of law, created no valid obligation.

It is unnecessary to add more. This court can make no contract for the parties; it must take the contract which they made; that contract was one that the county was not authorized to make. The bonds were void as adjudged in a court of law, void in whole and, in part, and they must be so adjudged in a court of equity, and, the county having received nothing of value, no equitable obligation can be enforced against it.

The demurrer will be sustained, and, the defect being one that cannot be remedied, a decree must be entered dismissing the bill.

Upon the back of said opinion appear endorsements in words and figures following, to wit: No. 209, doc. M. U. S. circuit court, district of Nebraska. Daniel T. Hedges *et al. vs.* Dixon County. Opinion. Filed Jan. 29, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, *on* the said January term of said court, on the 29th day of January, 1889, the following proceedings were had and done in said cause, as appears of record on folio 342, Journal "N" of said court, to wit:

DANIEL T. HEDGES, THOMAS C. SULLIVAN, THOMAS J. STONE, Edward B. Spalding, Lester C. Sanburn, J. L. Follett, A. S. Ganetson, Marshal Field, and Joseph N. Field } 209, M.
vs.
COUNTY OF DIXON.

Decree.

This cause came on to be heard at a former term of the court upon the demurrer to the bill, and was argued by Mr. Poppleton in support of the demurrer and by Mr. Wool-
17 worth in opposition thereto, and was taken by the circuit judge under advisement, and at this term, he having filed his opinion that the said demurrer is well taken, it is ordered that the said demurrer be sustained and the bill of complaint be dismissed at the costs of the plaintiffs, and the plaintiffs thereupon prayed an appeal to the Supreme Court, which is granted, and the penal sum of the appeal*ed* bonds is fixed at $500.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

18 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

I, Elmer D. Frank, clerk of the United States circuit court for the eighth circuit and district of Nebraska, certify that the foregoing folios, from one to 17, contain true and faithful transcripts of the

pleadings and proceedings of record and on file in my office as said clerk in the case of Daniel T. Hedges *et al. vs.* Dixon County.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court, at Omaha, Nebraska, this 30th day of September, A. D. 1889.

ELMER D. FRANK, *Clerk.*

19 Know all men by these presents that we, Daniel T. Hedges and —— ——, are held and firmly bound unto the county of Dixon in the full and just sum of five hundred dollars, to be paid to the said county, its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Daniel T. Hedges, Thomas C. Sullivan, Thomas J. Stone, Edward B. Spaulding, Lester C. Sanborn, J. L. Follet, A. S. Yarnson, Marshall Field, & Joseph M. Field, plaintiff-, and said county, defendants, a decree was rendered in favor of said defendant against said plaintiffs, who have obtained an allowance of said appeal admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such that if the said plaintiff- shall prosecute their appeal to effect and answer all costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

DANIEL T. HEDGES.
A. S. GARETSON.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 209, M. United States circuit
20 court, district of Nebraska. Daniel T. Hedges *et al. vs.* Dixon County. Bond. Filed Nov. 1, 1889. Elmer D. Frank, clerk.

Certificate.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, certify that I have compared the annexed copy of bond with the original on file in this office, and that the same is a correct transcript thereof and of the whole of said original.

Seal United States Circuit Court, District of Nebraska.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Omaha, in said district, this 19th day of December, 1889.

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 13,933. Nebraska C. C. U. S. No. 294. Daniel T. Hedges *et al.*, appellants, *vs.* The County of Dixon. Filed December 23, 1889.

Office Supreme Court U. S.
FILED.
OCT 27 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

DANIEL T. HEDGES ET AL.,
Appellants,
v.
THE COUNTY OF DIXON.

BRIEF AND POINTS FOR THE APPELLANTS.

J. M. WOOLWORTH,
C. L. WRIGHT,
Attorneys for Appellants.

Raber, Printer, Room B, N. Y. Life Building, Omaha, Neb.

IN THE

Supreme Court of the United States.

DANIEL T. HEDGES ET AL.,
Appellants,
v.
THE COUNTY OF DIXON.

BRIEF AND POINTS FOR THE APPELLANTS.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska. The suit was by bill in equity, alleging the following facts:

The Covington, Columbus and Black Hills Railroad Company was organized for the purpose of building and operating a railroad from Covington in the County of Dakota and State of Nebraska through the County of Dixon, and had entered upon the construction thereof, when in pursuance of an order of the County Commissioners of the County of Dixon, a vote of the electors thereof, and the statutes of the state, the county issued 87 bonds dated January 1st, 1876, each for one thousand dollars with 10 per cent annual interest, payable semi-annually. These bonds were endorsed with the following certificates: This certifies that the issue of bonds of which this is one, amounting in all to eighty-seven thousand dollars, is the only issue of bonds that has ever been made by the said county. The question of issuing said bonds was submitted to the people of the county by a resolution of the County Commissioners dated November 24th, 1875, in the following form: Shall Dixon

County issue to the Covington, Columbus and Black Hills Railroad Company $87,000.00 ten per cent twenty-year bonds, payable, both principal and interest, in New York City, and shall a tax be annually levied in addition to the usual taxes sufficient to pay interest as it comes due and accumulate a sinking fund to pay the principal at maturity?

This question was decided by a vote taken Dec. 27th, 1875, of 462 votes for to 120 votes against.

Witness my hand and official seal this 16th day of May, A. D., 1876.

E. M. BISBEE,
County Clerk.

(*Seal of Dixon County, Nebraska.*)

STATE OF NEBRASKA, } ss.
AUDITOR'S OFFICE. }

I, J. B. Weston, Auditor of State, do hereby certify that upon the basis of the data filed in my office it appears that the attached bond, No. 61, has been regularly and legally issued by the County of Dixon to Covington, Columbus and Black Hills Railroad Company, and said bonds, upon presentation thereof by said company, has this day been duly registered in my office in accordance with the provisions of an act entitled "An act to authorize the registration, collection, and redemption of county bonds," approved February 25th, 1875.

In testimony whereof I hereunto set my hand and affixed my seal of office, at Lincoln, this 2nd day of October, 1876.

J. B. WESTON,
Auditor of State.

(Seal Auditor's Office, State of Nebraska.)

Registry No. 1319, vol. A., page 26.

STATE OF NEBRASKA, LINCOLN, Oct. 2nd, 1876.

We certify that this bond is issued pursuant to law.

BRUNO TZSCHUCK,
Secretary of the State of Nebraska.
J. B WESTON,
Auditor of the State of Nebraska.

The plaintiffs hold nearly all these bonds; the holders of the balance are unknown. The plaintiffs and the other holders of the bonds all paid value therefor, and took them without notice of any facts invalidating them, relying upon the recitals contained therein and the certificates endorsed thereon, and believing them to be a valid and binding obligation of the County according to the terms and purport thereof. When the interest coupons matured they

were duly presented for payment, which was refused. In excuse for not performing its promises in the bonds and coupons contained, the County and its officers alleged that the amount of the bonds exceeded 10 per cent of the assessed valuation of the property of the County at the time of their issue, for which reason they were issued without authority of law; and that the act of issuing them was beyond the competency of the officers of the County in that behalf; and the plaintiffs are informed and believe that the aggregate amount of the bonds exceeded the assessed valuation of the property of the County. But the plaintiffs submitted that to the extent of the amount of the bonds within 10 per cent of the assessed valuation of the property of the County at the time of their issue, they ought to be held valid and binding upon the County; that the railroad, to aid in the construction of which the bonds were issued, has been built and is in operation, and is a first-class road in all particulars; and the County and its citizens and the owners of property therein have received such consideration as they were entitled to for the said bonds. The plaintiffs offer to surrender up to be canceled such amount of the bonds as exceeds 10 per cent of the assessed valuation of the property when the same were issued, each one of them surrendering his proportionate share of such excess; and they insist that the other holders of the bonds when they shall become known should be admitted to the benefit of the decree in this suit.

The prayer is for an accounting to ascertain the excess of the bonds above 10 per cent of the assessed valuation of the property of the County, and to distribute the same among the holders of the bonds, and for a decree declaring the bonds aggregating an amount equal to 10 per cent of the assessed valuation of the County valid and binding and ought to be paid, and the excess void; and decreeing that the County pay the interest upon so much of the bonds as shall be declared to be good and valid at the rate specified in the bonds down to the date of the decree. To the bill there was a general demurrer, which was argued before Mr. Justice Brewer while

he was Circuit Judge and was sustained by him, and the bill was dismissed. Plaintiffs prayed an appeal to this court which was granted.

Assignment of Error.

The appellant assigns for error the order of the Circuit Judge sustaining the demurrer and dismissing the bill for want of equity.

FIRST POINT.

The County and the people of the County have received all the benefits which were contemplated by the vote to issue the bonds. The allegations of the bill are that in order to aid the Railroad Company in the construction of its road, the County issued the bonds, (Paragraph 1 of the bill), and that the railroad in aid of which the bonds were issued has been built and is now in operation and is a first-class railroad in all particulars, and the County and its citizens and owners of property therein have received such consideration as they were entitled to for said bonds. (See Paragraph 5 of the bill.)

On the other hand, the plaintiffs purchased the bonds and paid value for them, without notice of any facts invalidating them, relying upon the recitals therein and the certificates endorsed thereon by the County Clerk and the Secretary and Auditor of State, and believing the same to be valid and binding obligations of the County according to the terms and purport thereof. (See paragraph 2 of the bill.) The certificates referred to in this allegation, set forth on pages six and seven of the transcript, gave to the public full assurance of the validity of the bonds. It may be that the plaintiffs were not justified in accepting the statements of these officers, although made in the most positive and solemn manner; it may be that the plaintiffs ought to have doubted the truth of the statements in the certificates and looked farther; nevertheless the fact remains that they believed the representations that the bonds were good and they paid value for them.

The case is then between parties on the one side who paid out their money in good faith, however improvidently, relying on the official statements of those who were reasonably supposed to know

the facts; and on the other side, who have received all the benefits for which they contracted. It is impossible to resist the conviction that as between these parties the justice of the case is with the appellants, even if the law cannot give them relief.

SECOND POINT.

The transaction between the County and the Company was one of contract and not of donation. In consideration of the building of the railroad by the Company, the County agreed to issue its bonds. Had the Company failed to build the road, it would not have been entitled to the bonds simply because it would not have rendered any consideration for them. If it built the road and that were the whole case, it could compel the delivery of the bonds; it could maintain a proper judicial proceeding for the purpose, that of mandamus or a civil action, because it had performed its contract and on that account was entitled to what the County had agreed to pay for the benefits thereby obtained.

If a County contract with an individual to build a turnpike or a bridge or a court house or a school house promising to pay a certain sum of money therefor, its promise is made upon a good consideration; it would not be pretended that the compensation agreed to be rendered was a gift. An action would lie upon the contract and judgment would be rendered for the amount. The difference between such a case and the one at bar, is that in the former the road, the bridge, the court house or the school house when once constructed belongs to the County; here the railroad belongs to the Company. But in one case just as much as in the other, there is a contract. The principle is the same; the circumstance in which they differ is immaterial.

The case of *New Orleans vs. Clark*, 95 U S., 644, was an action upon coupons detached from bonds issued by the City of Carolton which afterwards was consolidated with New Orleans upon which latter corporation its obligations were cast. The City issued the bonds to the Jefferson City Gas Light Company which was a corporation organized to lay gas pipes in the streets of the City and

introduce gas for its citizens in pursuance of a contract by which the company undertook to supply the City with gas.

Mr. Justice Field delivered the opinion of the court, and considering two grounds on which the invalidity of the bonds was asserted, said on page 652, that the first objection was that the bonds were issued in aid of a private corporation. "A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort and convenience of its citizens; and, though such work may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way."

The learned judge who rendered the decree here appealed from, misconceived this aspect of the case when he said that "there is not an equity here to compel payment by the County on the ground that it has received something; for the bonds were a donation and no implied promise can be based upon the matter of value received." Value was certainly received by the County, and its citizens; namely, the benefit which this railroad afforded to them; the same kind of benefit which the people receive from the construction of any road or canal or other public work by which intercourse and commerce are facilitated; the same benefit which support bonds in the ten thousand cases in which they are issued and without which such bonds would be utterly worthless.

The learned judge was perhaps betrayed into this expression by the language of the Constitution, Article XII, Section 2, which is as follows: "No city, county, town, precinct, municipality, or other subdivision of the State, shall ever make donation to any railroad or other works of internal improvement, unless a proposition so to do shall have first been submitted to the qualified electors thereof at an election by authority of law; *Provided*, That such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such

county; *Provided, further*, That any city or county, may by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent; and no bonds or evidence of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of State, showing that the same is issued pursuant to law."

The word "donation" generally means that which is transferred to another gratuitiously. But that is not the sense in which it is used here. If it were, there would be no constitutional limitation upon the issue of bonds in any amount, when the transaction between a county and a railroad company was upon contract.

If the word be taken in its usual signification, it is competent for a county to enter into a contract with a company to issue its bonds in any amount, in consideration of the construction of a railroad or other work of internal improvement. This would nullify the evident purpose of the provision. The word "donation" in the constitutional provision above set out cannot mean a gift in the ordinary sense of the term.

It is a misconception to suppose that the bonds were a gift and nothing was given in return. The county and the people of the county received in return for the bonds, all the advantages of a first-class railroad. It is quite useless to recount the advantages of a railroad in a new country. Everybody knows what they are. This court said in *Town of Pine Grove vs. Tuscott*, 19 Wall., 676-7, "The public character of such work cannot be doubted. Where they go they animate the sphere of their influence. Unless prohibited from doing so, a municipal corporation has the same power to aid in their construction as to procure water for its water works, coal for its gas works, or gravel for its streets, from beyond its territorial limits."

These advantages are a consideration for a promise; they are a consideration which converts a promise from a moral obligation to one which the law will recognize and enforce. The county and the voters of the county in effect said to the railroad company, "You

build a railroad through Dixon County of a certain character within a certain time and we will give you our bonds for a certain amount." The railroad company in effect answered, "We will build the road of the character and within the time limited relying on your promise to deliver the bonds when we have done so."

The transaction is within every definition of a contract. Of course if the company does not fulfill its undertaking, it is not entitled to the bonds. If in such a case the agents of the county are about to deliver the bonds, the court will enjoin their doing so. The reason for its interference is that the consideration has not been rendered to the county for which its promise was made. The multitude of cases of this class all proceed on that simple theory.

On the other hand, if the company does fulfill its undertaking by building a first-class road within the time agreed upon, the county must deliver its bonds according to its promise. If it refuse to keep its promise, the court will compel it to do so. Here, too, the reason is that having received the consideration for its promise, it must perform it. That is all there is of it.

This may seem more evident if the county gives the bonds in payment for the stock of the company; but it is not so in fact. As this court said in the *Town of Queensburg vs. Culver*, 19 Wall., 90-91.

"Subscriptions for stock, equally with donations, are outside of the ordinary purposes of such corporations, and the design of both is the same. It is to aid in the construction or maintenance of a public highway. It is for the promotion of a public use. The inducement to a subscription may be greater than the inducement to a donation. In the one case there may be a hope of reimbursement by the stock obtained; in the other there can be no such expectation. In both, however, *the warrant for the exercise of the power is the same.*"

THIRD POINT.

There is no principle in the jurisprudence of this Court better settled than this: that a party who has obtained property without authority of law ought not to retain it, and will be compelled to

restore it. The theory is that a promise to do so will be implied. This doctrine has been enforced in a great variety of cases.

It is applicable here. As applicable to counties it is shortly stated in *Marsh vs. Fulton County*, 10 Wall., 676, 684, in these words: "We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons natural and artificial; and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

Louisiana vs. Wood, 102 U. S., 294, was also an action upon bonds issued in the City of Louisiana in Missouri for the purpose of raising money to pay its debts. There were defects in the bonds which avoided them; but some of them were sold to purchasers ignorant of the defects and the proceeds or a part of them were applied to the purpose for which they were issued. The action was to recover the money so paid for the bonds.

Mr. Justice Waite delivered the opinion of the court and on page 298 said: "The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wroug to permit the city to repudiate the bonds and keep the money borrowed on their credit."

Read vs. Plattsmouth, 107 U. S., 568, was also an action upon coupon bonds issued without authority of law by the City of Plattsmouth, for the purpose of raising money with which to construct a high-school building within its corporate limits. The plaintiff was a purchaser of the bonds for full value without notice of any invalidity in their issue. The proceeds were applied to build the school house. The Legislature passed an act legalizing the bonds but it was objected that the act was special and within the inhibition of the constitution forbidding legislation by which corporate powers were conferred.

It was held that the act was not within this provision, inasmuch as a general obligation rested upon the city as upon an implied contract to refund to the plaintiff money received from him which had been applied to corporate purposes.

Mr. Justice Matthews delivered the opinion of the court and assuming that the bonds were void, said on page 575: "The city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept, and used, immediately arose. This obligation, according to the general principles of law accepted in Nebraska, was capable of judicial enforcement."

And again, on page 576 he says: "As the city of Plattsmouth was bound, by force of the transaction, to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and, by confirming it according to the original intention and promise, cannot be said to be a special act conferring upon the city any new corporate power. No addition is made to its enumerated or implied corporate faculties, no new obligation is, in fact, created. The language of the constitution, forbidding special legislation of that description, evidently refers to grants of authority to be exercised by the body itself and in the future, and a consideration of the evil intended to be remedied by the prohibition will confine it to grants of that character, and will not include a statute like that now under discussion."

The Court cites *The Commissioners of Jefferson County against The People*, 5 Neb., 127, which is in principle a similar case. So, too, *Clark vs. Saline County*, 9 Neb., 516, was where the county agreed to convey to Clark, five thousand acres of land, the title to to which, it was supposed, was acquired from the State, and a further sum of money, as compensation for building a bridge across one of the rivers in that State. The title failed and Clark sued the

county for the value of the bridge and it was held that the action was well brought.

If Dixon County had undertaken to build an ordinary public road and had employed a party to furnish material or perform labor therefor, it would, upon the principle stated above, and illustrated by the cases cited, have been compelled to pay therefor; that is plain. The liability is not changed by the fact that the work is a railroad. As stated above, the only difference between the cases cited and the one at bar is that in them what had been obtained by the county and the city was added to their property, while here the property belonged to the company. We have shown that that is an immaterial circumstance.

FOURTH POINT.

Passing from these general considerations to the special circumstances of the case, the question first presents itself in what does the alleged illegality of the bonds consist. Was it the vote of the people that was void, or was it the act of issuing the bonds that was vicious? It is obvious that the consequence may be very different in the two cases. The learned judge below seems to have thought that the illegality lay in the vote, for he says: "There is no breach of duty charged upon the county officers; the agents have not departed from their instructions. The trouble lies in the action of the principal itself. Its action was unauthorized, and, being without warrant of law or rather in defiance of law, created no valid obligation." This was a mistake.

Turner vs. The Board of Commissioners of Woodson County et al, 27 Kans., 314, was an action by a resident citizen and taxpayer of a township in that county to restrain the issue of certain bonds of the township to the St. Louis, Fort Scott and Wichita Railroad Company. The County Commissioners submitted to the voters a proposition to issue $2,700 of the bonds of the township, to be applied in payment of a subscription to the stock of the company. Under the limitations of the statute the $2,700 vote exceeded the amount which the township might lawfully issue by the sum of

$614.45; all the proceedings were legal and regular except in this one particular: The District Court enjoined the issue of that amount of the bonds voted, but refused to enjoin the issue of the remainder.

Mr. Justice Brewer delivered the opinion of the court and upon the point we are now considering, said:

"The prohibition in the statute is on the issue of the bonds. Its language is: 'No township shall be allowed to issue more than,' etc., so that whatever amount the township may be willing to vote, and whatever amount they may by their vote authorize the commissioners to issue, the statute steps in and prescribes a limit beyond which the commissioners may not go. Reference is made to the case of *Marcy vs. The Township of Oswego*, 92 U. S., 637, decided in the first instance in the Circuit Court by Mr. Justice Miller; and to the case of *Hurt vs. Hamilton*, 25 Kas., 76, in which an opinion is expressed antagonistic to the views of the Supreme Court of the United States in the case just cited. In the former case Mr. Justice Miller held that, because the township had voted to issue more bonds than it lawfully could under the statute, the whole series thus voted was void. The Supreme Court of the United States reversed this ruling, and held them all valid, at least in the hands of *bona fide* holders. But a more marked distinction exists between the statute under which the bonds were voted in this case and that under which the bonds in the Oswego case were voted. That statute provided, (Laws 1870, Ch. 90, Sec. 1) 'that the amount of bonds voted by any township shall not be above such an amount,' etc. This, as heretofore stated, is 'No township shall be allowed to issue more than,' etc. But even in that case, notwithstanding the amount authorized by the vote was excessive, yet if in fact the authorities had only issued the amount the township might legally issue, it may well be doubted whether in the Circuit Court the bonds would not have been held valid by Mr. Justice Miller; and of course there would be no question as to the decision in the Supreme Court of the United States; but there the limitation is upon the issue, not upon the vote. However excessive the authority apparently granted by

the vote to the commissioners, that authority is good up to the statutory limit. The vote of the township was simply an authorization by a principal to its agent, and the agent may perform the act authorized, except so far as it is restrained by some provision of law. Generally speaking, a grant of excessive authority is good up to the legal limit, and an authorization to do more than can legally be done is void only as to the excess. Hence we conclude that the first and principal objection to the ruling of the District Court cannot be sustained."

The constitutional provision which we are considering is to the same effect. It forbids not a *vote* of the people that bonds be issued in excess of ten per cent of the assessed valuation of the property of the County, but that a *donation* in excess of that limit shall not be made; the inhibition is upon the *issue* and not upon the *vote*.

FIFTH POINT.

The question here is whether the vote to issue these bonds avoided all of them or only the excess.

The general principle is that if the act of a corporate authority exceed its competency it will be maintained and a liability arising thereon will be enforced, to the extent of the delegated power and will be avoided only as to the excess. Cases illustrative of this principle will be cited only where the corporation was public; such as a county.

Johnson against The County of Stark, 24 Ill., 75, was an action of debt on fifty bonds and coupons issued by the defendant to a railroad company. The coupon was by its terms payable in New York while the county had no power to make the same payable at any other place than its treasury. Walker, J., on page 92, says: "The doctrine is well recognized, that in exercising a power, all acts performed in excess of or beyond the power delegated, must be rejected as unwarranted; and if, after their rejection, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts beyond the power delegated. But, on the contrary, if the acts performed beyond the authority

conferred, are so inseparably connected with the acts properly performed, that by their rejection the power remains unexecuted, then the whole transaction must be rejected as void. When tested by this rule, it will be perceived that this (92) coupon may be sustained as valid, and payable at the treasury of the county. The law authorized the county to issue it and requires no place of payment to be named. And where none is specified, it, by operation of law, is payable at the treasury. If this coupon had not contained the language: 'at the city of New York,' it would have been a legal instrument, strictly conforming to all the requirements of the law authorizing counties to issue evidences of indebtedness. If, then, this unauthorized portion of the coupon was rejected, it would be in conformity to the law, and for the purpose of upholding it, the law will reject that portion as surplusage. This doctrine was announced by the very able District Judge of the United States District Court for Wisconsin in the case of *Mygatt vs. The City of Greenbay*, which was precisely similar to this case."

The City of Quincy against Warfield, 25 Ill., 279, was also an action upon county bonds which by their terms drew interest at 12 per cent per annum while the city had no power to issue bonds bearing more than 8 per cent interest per annum.

Mr. Justice Breese says upon this objection, "But it is said the bond is void, because it stipulates for a greater rate of interest than eight per cent per annum. In the case of *Johnson v. Stark County*, 24 Ill., 75, we recognized the doctrine that in exercising a power, all acts performed in excess of, or beyond the power delegated, must be rejected as unwarranted; but if after the rejection of such acts, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts performed beyond the power delegated. In other words, so much of the act done as is within the power granted, shall be upheld, whilst all beyond the power shall be rejected as an excess of power."

"Upon this ruling in this case, we must decide, and do decide that the bond is valid and binding on the city, with interest, to be calculated at eight per cent per annum. It is not vitiated by the

excess, but only *pro tanto*, and the court trying the case should have made the deduction, and given judgment for the bond, with interest at eight per cent per annum, the city having no power to stipulate for interest beyond that rate."

The same principle was applied in another case upon quite a different state of facts. The case is *Briscoe vs. Allison*, 43 Ill., 290. It was a bill filed by Allison and others who were taxpayers in Marshall Township, Clark County, to restrain the collection of a tax to pay war bounty orders and restrain Briscoe, who was Clerk of the County Court, from issuing any more such orders. On the 7th of February, 1865, the general assembly passed an act authorizing the Board of Supervisors of Clark and other counties to levy a special tax to raise a sufficient fund to pay a bounty to persons enlisting in the military services of the United States during the rebellion. On the 15th of March following, resolutions were passed by the Board of Supervisors declaring that all persons who had or should thereafter voluntarily enlist or be drafted into the service and be credited to the town in the County until its quota was filled should be paid a county order for $400. There was no question of the power to issue the warrants for enlistments after the last date; but some eight or ten orders were issued to persons who had enlisted after the passage of the law but before the adoption of the resolutions. The court found that these orders were without legal authority and should not be paid, and came then to the question whether the entire tax should be restrained because the same provided for the payment of the eight or ten orders which were illegally issued. On page 296 the Court says: "Under a bill properly framed, a court of chancery would prevent the holders from collecting, or the treasury from paying them. Or if the Court can, under this bill, ascertain the proportion the illegal bear to the legal bonds, it could thereby be determined what portion of this tax would be illegal, and, when ascertained, the portion of the tax necessary, and which would go to pay those illegally issued bonds should be restrained and the remainder collected."

Still another case is presented in the case of *The State vs. Allen*,

Ib., 456. The proceeding was for judgment against the lands upon taxes had been levied and remained unpaid, one objection being that taxes were in part for the payment of bounties, the power to levy which was limited to 3 per cent while the levy was for 5 per cent. Upon this subject Walker, C. J., delivering the opinion says on page 461 :

"It is conceded that the town authorities in Atkinson had the power to levy a bounty tax of 3 per cent, but it is urged, that by exceeding their authority, and levying 5 per cent, their action became void. It is a familiar principle that in the exercise of delegated power, all acts within the scope of the authority will be sustained, where such acts can be separated from those in excess or outside of the power. But, when the acts within the power are so intimately connected with those outside of the power that they cannot be separated, then the entire action of the agent or officer must fail. If it were conceded that the town could levy but 3 per cent for the given purpose, and that the additional 2 per cent was wholly unauthorized, still the levy and the collection of the 3 per cent which was authorized could be enforced, independent of the additional levy of the 2 per cent. The latter could be rejected and the former sustained. In extending this tax the clerk adopted this course, and rejected the 2 per cent as unauthorized, and extended a tax of 3 per cent, which all concede could be legally levied. It is manifest that it was levied, and because more was levied, it did not vitiate that legal and authorized levy. We perceive no weight in this objection."

This case was followed in *Allen vs. The Peoria & Bureau Valley Railroad Company*, 44 Ill., 85 and in *Mix vs. The People*, 72 Ill., 241.

SIXTH POINT.

McPherson vs. Foster, 43 Iowa, 48, was an action in Chancery brought by resident taxpayers and owners of real estate in the independent school district of Steamboat Rock, in Hardin County to restrain the levy of a tax for the payment of bonds and interest issued by the School District. The officers of the School District entered into a contract with Foster to build a school house and agreed to issue to them bonds to the amount of $15,000. The

house was built and the bonds issued to Foster. The constitution of the state and the statutes as well, provided that no municipal corporation should become indebted in any manner or for any purpose, to an amount in the aggregate exceeding 5 per cent of the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax list previous to incurring such indebtedness. The statute of the state limited the power of School Districts to issue bonds, so as not to permit a greater outstanding indebtedness than five per cent. The taxable property of the district amounted to $49,660.00, five per cent of which was $2,482.50, and it had an outstanding debt of $425.00, so that the limit of the indebtedness which under the constitution and the statute could be contracted by the district was $2,057.50. It was held that this excessive issue of bonds was void even in the hands of *bona fide* holders for value.

Beck, J., delivered the opinion of the court and dealing with the question before us said: (Page 71.)

"The independent district could become indebted to the extent of 5 per cent upon the amount of the last tax list. Deducting the existing indebtedness from such sum, we find the amount of the debt it could contract was $2,057.50. But it has attempted to contract a debt of $15,000. We have seen that for the excess over the prescribed limit no right of action exists against the district. The question now arises, is the district liable for the amount of the indebtedness within the restricted limit. We think it is. As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of $2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of $2,057.50 for which the district had power to issue its bonds. That sum is a valid debt. The bonds to that extent are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure a lawful debt they are valid. So far as the debt is unlawful, they are invalid. The case is anal-

ogous to the act of an agency which is partly within his authority and partly without. The act so far as authorized, would bind the principal, while, to the extent it was unauthorized, it would not be binding. Of such acts it is said, 'When there is a complete execution of authority, and something *ex abundanti* is added, which is improper, there the execution is good, and the excess only is void.' "

Story on Agency, Sec. 166.

"It appears that the bonds all bear the same date and were issued, though at different times, as a part of one transaction. They were intended as security for a debt of $15,000, which was attempted to be contracted in building the school house. It cannot be said that, in justice, invalidity should attach to certain particular bonds, while others, to the amount for which the district could lawfully contract indebtedness, should be held valid. Each bond being but a part of the whole debt, must partake alike of invalidity and validity—it must be partly valid and partly invalid. The whole alleged debt is $15,000; of this sum $2,057.50 is valid. Each bond will be valid to the extent it represents a portion of the debt lawfully contracted. Such a sum is the proportion of the amount of the bond as $2,057.50 bears to $15,000; that is $\frac{2,057.5}{15,000.0}$ of the principal of each bond is valid and collectable. The interest on each bond is determined by the same rule, or calculated upon the amount of each bond held to be valid."

This case was followed in *Stockdale vs. Wayland School District*, 47 Mich., 226. This also was a bill by the taxpayers of a school district to restrain the district board from issuing bonds. White was a contractor for building a school house for the district and completed his work and received the contract price therefor. "He also performed extra labor amounting in value to $181 upon which $50 were paid. At the annual school meeting of 1880 the electors by a two-thirds vote, on his petition showing that he had lost money on the contract, voted to pay him in settlement $730.31 and to issue bonds therefor. Voters dissatisfied with this action procured a special meeting to be called a few days thereafter, at which the proposition to rescind the former action was voted upon and a majority, but not two-thirds, voted in its favor. The moderator decided that a two-thirds vote was essential, and that conse-

quently the rescinding vote was lost. This suit was then instituted, making the district and White defendants, and the court of chancery awarded a perpetual injunction."

Judge Cooley having stated the case as above, delivered the opinion of the court upon the question before us and used the following language:

"There seems, however, to have been a statutory limit to the amount of bonds which the district might issue; and this was overlooked at the first meeting. The limit for districts having more than 100 and less than 200 children within the school ages — as this district had — is $3,000. Public Acts 1877, p. 169. The district was already bonded to the amount of $2,700, and if the vote had been limited to $300 it would have been valid. Having exceeded that sum, it is claimed to be void.

"In *McPherson vs. Foster*, 43 Iowa, 48, involving substantially the same question, the vote was held valid to the extent that would have been admissible had the limited sum been proposed and voted; and we agree in this view. See also *Grand Gulf Bank vs. Archer*, 8 Smedes & M., 151. The injunction should therefore have been restricted to the excess above $300."

McPherson vs. Foster, *supra*, was followed in *Culbertson vs. The City of Fulton*, 18 N. E. Rep., 781.

This was a bill by taxpayers of the city to restrain the issue of bonds to pay for a system of water works. The whole amount of indebtedness contracted for the purpose was $11,619.00, but by the provision of the constitution a debt could be contracted for only $10,453.05. It was held that the debt was valid to an amount within the limit, but void beyond that amount.

The Citizens' Bank vs. The City of Terrell, 14 S. W. Rep., 1003; 78 Tex., 450, was an action upon coupon notes from bonds of the city. The whole amount of the issue was $28,000 and the object thereof was the payment of the cost of construction of a system of water works. The assessed value of the taxable property within the city was $749,363.00. The constitutional provision limited the power to create debts to a sum, the interest and two per cent of the principal of which could be paid out of a levy of 25 cents on each

$100.00. Dealing with the question before us here, Henry J., speaking for the court, said: "If the bonds were delivered at different dates, those first delivered, up to the amount of the debt that the city could lawfully create, should be paid, and the remainder of them should be treated as nullities. *Daviess Co. vs. Dickenson*, 117 U. S., 657; 6 Sup. Ct. Rep., 897. If all of the bonds under the first ordinance were delivered at the same time, so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds. *McPherson vs. Foster*, 43 Iowa, 72. The bonds that were issued under the last ordinance cannot be treated as valid for any purpose. Which of the bonds were so issued should not be determined by their numbers alone, if there exist any other means of identifying them. If no other means exists of distinguishing them from the others, then, from the necessity of the case, the numbers must be looked to to determine the fact, and the bonds above the number 28 must be held to be those issued under the last ordinance. The coupons will, of course, be governed by the principles applied to the bonds from which they were detached. Under the view we take of the law, the original holders, as well as any subsequent holders of the bonds or coupons, may recover so much of the debt as was lawful. Neither the pleadings nor the proof, in the record before us, present the case so as to authorize a judgment of the nature indicated by us as being proper. Strictly speaking, no judgment other than the one from which the appeal was taken, could have been rendered. We think it right, however, to give the appellee an opportunity to amend his pleadings, and have the issues so presented as to show what proportion of the debt sued on he may be entitled to recover, under the rules that we here announce. The judgment is reversed, and the cause is remanded." This case was followed in *Nolan County vs. The State*, 17 S. W. R., 823.

In the *Ætna Insurance Company vs. Lyon County*, 44 Fed. Rep., 329, the very form of action which we have brought here was suggested and approved by District Judge Shiras. That was an action at law on interest coupons detached from bonds issued by the

county. The facts are somewhat complicated. All that it is necessary to present for the purpose of this case are the following: The bonds were issued for the purpose of taking up a prior indebtedness of the county. The competency of the county to contract an indebtedness was limited by the constitution of the state to five per cent of the assessed valuation of the property of the county. The bonds were issued for an amount much beyond this limit and were held to be void.

The learned judge says on page 345: "The evidence shows that, when the bonds owned by plaintiff were issued and sold, there was outstanding against the county bonds representing judgments and possibly other enforceable debts, to an amount exceeding 5 per cent of the taxable property in the county. It follows that, to the extent of this enforceable indebtedness, the county could have issued valid refunding bonds. The amount of bonds issued and sold exceeds the amount of this enforceable indebtedness, and it may be said, therefore, that part of the indebtedness represented by this series of bonds is valid and enforceable and part not. That the holders of these bonds have equities against the county, will not be questioned. The question is, whether effect can be given thereto in this action."

"It is argued that the bonds would be valid until the amount needed to refund the enforceable debt had been reached, and that it will be presumed that the bonds were sold in the order of their number. Such a presumption cannot be indulged in under the facts of this case. To settle the equities and rights of the bondholders against the county, and their rights as between themselves, would seem to require the institution of a suit in equity. In this action at law between one owner of part of the bonds and the county, it is beyond the power of the county to hear and determine the question of the order in which the series of bonds were sold, or the application of the proceeds realized from the sales thereof, and whether the facts are such that a certain number of the bonds can be held valid at law, or whether it should not be held that each owner of a bond is equitably entitled to demand his share of the total sum which may be adjudged to be collectible from the county."

"It seems to me that the only means of solving the difficulties

of the situation is for the plaintiff and the other non-resident bond-holders to unite in a proper proceeding in equity, against the county and such other bond-holders as may refuse to act as complainants, and in such suit it can finally be determined for what amount the county can be held liable, and the rights of the respective bond-holders in and to this sum can be decreed. As the case now stands I hold that the facts show that the series of bonds issued by the county and negotiated by B. L. Richards, as agent of the county, represent, in part, bonds which were previously issued and which were enforceable against the county and in part bonds which were invalid and non-enforceable; but that in the present case at law, and in the absence of interested parties, it is impossible to determine what part or proportion of the coupons sued on belong to bonds that represent the valid indebtedness refunded therein. While the plaintiff has shown a right of recovery against the county for some amount, it has failed to show a legal right to recover on all the coupons sued on, or any particular number thereof, and hence there is no basis for rendering a judgment at law in the present cause. For this reason, judgment herein must be in favor of defendant; such judgment, however, to be without prejudice to the right of plaintiff to establish, in any other proper proceeding, its rights against the country growing out of the purchase by plaintiff of the bonds of the county."

Francis vs. Howard County, 50 Fed. Rep., 44, was also an action upon interest coupons detached from negotiable bonds of the county for the purpose of building a court house. The defense was that the taxable property of the county was $863,011.38 and that the county had power to issue bonds to the amount of $14,987.77 whereas the issue was $35,000.

Maxey, District Judge, says upon the question before us:

"It has been shown that bonds numbered 1 to 35 inclusive are in part valid and partly void. The question now arises, is the county liable for the amount of indebtedness within the restricted limit? The Supreme Court of this state replies in the affirmative. *Bank vs. City of Terrell, supra; Daviess Co. vs. Dickinson, supra; Insurance Co. vs. Lyon Co., supra.*"

SEVENTH POINT.

If we are right in our contention that the infirmity of the proceedings was not in the VOTE *of the electors* but in the ISSUE *by the*

county officers, the case is within the principle of *Daviess County vs. Dickinson*, 117 U. S., 657. That case was this:

A County Court of Kentucky was authorized by a statute of that state to subscribe for the stock of a railroad company to such an amount as it might determine and levy taxes to pay therefor, or issue bonds of the county for the amount; it further provided that a proposition to subscribe for the stock to the amount determined by the County Court, should be first submitted to the voters of the county and approved by a majority of them. The proposition was submitted to the voters to subscribe $250,000.00 of the stock, and the vote was in favor of the proposition. An order of the County Court was then made to subscribe that amount, and bonds to that amount and for sums and payable at times specified in the order should be sold and disposed of by a committee appointed for the purpose, and a list of them entered upon the county record. The officers of the county issued bonds for a greater amount than that pecified, and all of them as they were delivered were entered upon the county records in a register opened for public inspection. The court held that the power to issue bonds was limited to $250,000.00 and bonds issued in excess of that amount, were unlawful and void, and that the bonds to that amount, which were first delevered were the valid ones, and entitled to payment accordingly.

Had the County officers issued all the bonds at once to one party, they would have been good up to the amount of $250,000.00 and the excess would have been bad; the whole issue would have been reduced to the legal amount either by cancelling what was necessary for the purpose, or by endorsing each with what brought it to the *pro rata* share of the legal debt. The accident of issuing the bonds at one time or at different times and the other accident of their being held by one or many men, would not have stood in the way of doing justice. The same result would have been reached without much trouble from the circumstances. Very probably in the case supposed the remedy must be sought in equity because the judgment called for by the exigency would have been too complex to be rendered by law. That however, is not material to our purpose for we have come to equity for its peculiar relief.

It is only saying the same thing to insist also, that the infir-

mity being in the issue and not in the vote, the identification of legal bonds separate from the illegal ones, is not necessary to reach a just result. In effect the whole debt is before the court; all the creditors are here asking to have the true amount ascertained and distributed among them; it can be as easily and certainly done as if the bonds were issued in several successive parsels.

Gillim vs. Daviess County, 14 S. W. Rep., 832, involved a question arising upon the same issue of bonds. It was a suit by a tax-payer to enjoin payment of interest on the excessive issue and impleaded all of the bondholders; and one of them tendered his cross-petition for equitable distribution of the tax collected. Upon the case thus made the decree was rendered fixing the order in which the bondholders were to be paid. We are not concerned here with the order so prescribed; our object is to show that when all the parties are before the court the amount due upon the issue so far as it is valid will be ascertained and distributed; the excess being avoided.

EIGHTH POINT.

There are many cases of action at law upon bonds and coupons of a series, the whole of which exceeded the amount authorized by the statute, in which it has been said that the whole issue was for that reason void. *Dixon County vs. Hedges* upon the bonds which are the foundation of this suit, is an illustration. Those cases and what is said in the opinions in them do not reach this case. The question here was not presented in those cases and the language of the opinions can have no application here. That question could not be presented in those cases; even had it been considered and resolved according to our contention, a judgment could not have been rendered accordingly. The remedies administered by courts of common law are too rigid for such purpose.

But equitable remedies are in their nature so flexible as to be adapted to such a case, and equity will not heed what courts of law have said when such issues of bonds have been before them. Another case having every element unlike what is involved in actions

at law, is here presented and calls for another rule, the administration of which secures perfect justice between the parties; giving to the appelants who parted with their money in good faith, what the appellee was competent to promise, and at the same time securing to the appellee the full consideration for its promise.

That is only common justice.

J. M. Woolworth,
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Attorneys for Appellants.

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Supreme Court of the United States.

DANIEL T. HEDGES, *et al.*,
Appellants.

vs.

THE COUNTY OF DIXON.

BRIEF FOR APPELLEE.

JOHN M. THURSTON,
Of Counsel.

OMAHA PRINTING COMPANY

Supreme Court of the United States.

DANIEL T. HEDGES, *et al.*,
Appellants,
vs.
THE COUNTY OF DIXON.

BRIEF FOR APPELLEE.

JOHN M. THURSTON,
Of Counsel.

In 1876 Dixon County, Nebraska, issued $87,000 of its bonds as a donation to the Covington, Columbus and Black Hill Railroad Company. The amount of such issue exceeded ten per cent. of the assessed value of the property of the county. A single proposition was submitted to the voters providing for a bond donation in the above amount. The validity of the said bonds was passed upon by this Court in the case of Dixon County vs. Field, 111 U. S., 83, in which case Mr. Justice Matthews, delivering the opinion of the Court, says:

"These views coincide with those expressed by the Supreme Court of Nebraska in the case of Reineman vs. The Covington, Columbus, etc. Railroad Company, 7th Neb., 310, where the very question raised here was discussed and decided; so that the construction we have adopted of the constitution of

the state we cannot but regard as not only correct in itself, but as now the settled rule of decision established by the highest judicial tribunal of the state. It follows that the bonds in question were issued without warrant of law, and if the defense is permitted, must be declared void, and insufficient to support the judgment. * * * We hold, therefore, that the plaintiff in error is not estopped by the recitals in the bond to deny their validity; and that having been issued in contravention of the constitution of the state, they are without warrant of law and are void."

The bond issue was void because the people of the county under the constitution and laws of the state had no right to adopt the bond proposition as submitted. The bonds were void because the proposition (which constituted the contract of the case) was void.

It may be true that the electors of the county would have adopted a similar proposition for the donation of a less amount of bonds, but the courts have no power to declare that the people voted for or adopted any other proposition or entered into any other contract than the one actually submitted. This proposition was an entirety; the taint of invalidity affected every provision of it; it was void *ab initio*, and the county officers were powerless to issue any bonds by virtue of it.

It is now proposed by a proceeding denominated "equitable", to compel the county to pay the holders of the said void bonds such a proportionate

amount of the whole thereof as the electors of the county might have donated if a lawful proposition had been submitted to and adopted by them. I submit that there is no equity in such a claim. The county, as such, received no consideration or valuable thing for the bonds.

Under the terms of the statute authorizing the issue of bonds to aid in works of internal improvement, such bonds are donations to the project; and the railroad company constructing the road in aid of which the bonds are issued must decide for itself in advance as to whether or not there has been a legal exercise of the powers of the county with respect to the authorization of the bonds. There is no doctrine of innocent holder which can be invoked, as this Court has already determined that the purchaser of the bonds were bound to take notice of the assessed valuation of the county and to determine by mathematical calculation as to whether or not the county had authority to issue the bonds.

The complainant is not attempting to sue for any consideration paid by him or other holders of the bonds to the county. They are not seeking to enforce any contract as against the county; if they were, the statute of limitation has run against their claim. In a court of equity their demand is stale. Whatever consideration the county received was in the year 1876. The bonds were invalid at the date

of issue. Any claim for equitable recovery arose in favor of the first holders of the bonds immediately upon their receipt or purchase of the same. The bill in this case was not filed until the 26th day of May, 1888,—more than twelve years after the issue of the bonds. Any equitable demand which might have existed against the county on the theory of consideration received, was in favor—and in favor alone—of the Covington, Columbus and Black Hills Railroad Company, which constructed the road in aid of which the bonds were issued. It is not even alleged that there has been any assignment of the claim of the railroad company against the county to the complainant or his associates; their sole contention is that they purchased the bonds in question, not from the county, but from former holders; and if any equitable claim arises in their favor it must be against the parties from whom they purchased. They did not deal with the county; there was no privity between the parties to this case.

Further discussion seems unprofitable. I fear to attempt a more elaborate presentation when the law of the case has been so clearly, ably and unanswerably stated by Mr. Justice Brewer in his opinion rendered in the Circuit Court, and which opinion appears on pages 9, 10 and 11 of the record in this case. To that opinion I cite the careful consideration of the Court.

JOHN M. THURSTON,

Of Counsel for Appellee.